IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 61223-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAVIER OMAR LOPEZ-MENDOZA,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 27, 2009
	)	
	)	

Cox, J. — To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[1] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[2] Here, defense counsel had legitimate strategic reasons for the alleged deficient conduct of opening the door to certain evidence at trial. We therefore conclude that Javier Omar Lopez-Mendoza was not denied effective assistance of counsel. Moreover, none of his additional grounds for review warrants relief. We affirm.

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[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[2] McFarland, 127 Wn.2d at 336.

Lopez-Mendoza met R.V. in August 2005. They had a son together in July 2006. After the baby was born, Lopez-Mendoza went to live with R.V. and her family.

R.V. testified that her relationship with Lopez-Mendoza changed after he moved into her residence. He began hitting her, choking her, and pulling her hair. Lopez-Mendoza also began to force R.V. to perform oral sex on him. He once forcibly penetrated R.V.'s anus with his penis.

Lopez-Mendoza also developed a sexual relationship with R.V.'s thirteen-year-old sister, S.V.

The State charged Lopez-Mendoza with two counts of second degree rape and three counts of second degree rape of a child. After an eight-day trial, a jury convicted him as charged.

Lopez-Mendoza appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Lopez-Mendoza argues that he was denied effective assistance of counsel because his counsel opened the door and failed to object to irrelevant and prejudicial evidence. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[3]

The reasonableness inquiry presumes effective representation and

[3] Strickland, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35.

requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[4] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the verdict would have been different.[5] If one of the two prongs of the test for ineffective assistance is absent, we need not inquire further.[6]

Here, the State charged Lopez-Mendoza with two counts of second degree rape by forcible compulsion based on the evidence relating to R.V.[7] Second degree rape by forcible compulsion does not require the State to prove that the defendant used or threatened to use a deadly weapon.[8]

During cross-examination of R.V., defense counsel introduced the subject of Lopez-Mendoza's alleged use of a knife to threaten R.V. Lopez-Mendoza argues that his counsel rendered ineffective assistance by opening the door and

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[4] McFarland, 127 Wn.2d at 336.

[5] Matter of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[6] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

[7] The State also charged Lopez-Mendoza with three counts of second degree rape of a child based on evidence regarding a different victim, S.V., but Lopez-Mendoza does not argue how the alleged ineffective assistance of counsel might have affected these counts.

[8] RCW 9A.44.050(1)(a) (A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person by forcible compulsion . . . .); but cf. RCW 9A.44.040(1)(a) (A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory uses or threatens to use a deadly weapon or what appears to be a deadly weapon . . . .).

failing to object to detailed testimony about his alleged use of knives to threaten R.V. during times separate from the alleged acts of rape.

In context, however, it is clear that counsel had strategic reasons for introducing this subject. Specifically, the questions at issue were part of an effort to attack R.V.'s credibility.

During the State's direct examination, R.V. testified that she did not disclose to authorities that Lopez-Mendoza raped her at the same time that she reported that he had been physically abusive toward her. R.V. testified that she did not initially disclose the sexual assaults out of fear of Lopez-Mendoza and threats that he had made to her.

During cross-examination, defense counsel highlighted the fact that R.V. provided a lengthy statement to Auburn Police Detective Robert Jones on February 27, 2007, outlining various acts of abuse by Lopez-Mendoza yet failing to disclose any acts of sexual assault. Defense counsel then questioned R.V. about a petition for a protection order she filed on March 3, 2007, where she again alleged acts of physical violence and threats by Lopez-Mendoza, including threats with a knife, but still failed to disclose any acts of sexual assault. Finally, defense counsel cross-examined R.V. regarding a letter that she wrote dated March 14, 2007, where, again, she outlined various allegations of physical assaults by Lopez-Mendoza, including threats with a sharp weapon, but did not include any mention of sexual assaults.

The strategic purpose for introducing evidence that R.V. alleged Lopez-

Mendoza had threatened her with knives was to attack her claim that she did not disclose the sexual assaults out of fear of him. Defense counsel was attempting to point out that R.V. apparently had no fear of reporting that Lopez-Mendoza did many bad things to her. She freely reported to Detective Jones on February 27, 2007, that Lopez-Mendoza had hit her. She freely documented in the March 3, 2007, petition for a protection order that Lopez-Mendoza had pulled her hair, hit her legs, and slapped her four times. She went on in that statement to freely accuse him of using drugs and fighting with drug dealers, as well as feeding beer to their infant son. She also freely, without fear, was willing to accuse Lopez-Mendoza of using weapons against her.

The inference defense counsel attempted to draw was that R.V.'s explanation for not timely making the rape allegation is not to be believed. By attacking her explanation for not reporting, the strategy was that the jury would conclude that the reason she did not report the rapes was because they never happened. This strategy was clearly articulated by defense counsel in closing arguments.

Because Lopez-Mendoza has not shown that his counsel's performance fell below an objective standard of reasonableness, we need not reach the prejudice prong of analysis.[9]

STATEMENT OF ADDITIONAL GROUNDS

Lopez-Mendoza filed a pro se Statement of Additional Grounds for

[9] Strickland, 466 U.S. at 697.

Review raising several issues. We conclude that none of them requires reversal.

A number of Lopez-Mendoza's arguments challenge the credibility of the witnesses at his trial. This court does not review a jury's credibility determinations.[10] Moreover, DNA and other scientific evidence is not necessary to secure a conviction in a case like this.

Lopez-Mendoza argues that the prosecutor committed misconduct by speaking to R.V. during a break in trial, as evidenced by the record. Lopez-Mendoza appears to read the court's repeated instructions to "not discuss the case" during breaks as applicable to all persons in the courtroom. But the court's instructions were only for the jury.[11] We see no problem with an attorney speaking to his or her witness off the record during a trial. And here there is no evidence of improper "coaching," as Lopez-Mendoza suggests.

Lopez-Mendoza challenges the sufficiency of the State's evidence that S.V. was "at least twelve years old but less than fourteen years old"[12] at the time of the acts serving as the basis for his second degree rape of a child conviction. He cites allegedly conflicting evidence on this point. He argues that the

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[10] State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) ("Credibility determinations are within the sole province of the jury and are not subject to review.").

[11] See 11 Washington Practice: Washington Pattern Jury Instruction: Criminal 1.01, at 3-5 (2008) ("Until you are in the jury room for . . . deliberations, you must not discuss the case with the other jurors or with anyone else.").

[12] See RCW 9A.44.076.

evidence shows S.V. was 14 years old at the time of the acts, making the applicable crime third degree rape of a child.[13]

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[14] An appellate court defers to a jury's resolution of conflicting testimony and witness credibility determinations.[15]

A person is guilty of second degree rape of a child when the person has sexual intercourse with another who is at least 12 years old but less than 14 years old and not married to the perpetrator and the perpetrator is at least 36 months older than the victim.[16] Here, even assuming that Lopez-Mendoza is correct that the jury heard conflicting evidence regarding S.V.'s age, the evidence was sufficient to support his conviction. S.V. testified that her birth date was February 6, 1993. S.V.'s mother also testified that S.V.'s birth date was February 6, 1993. The second amended information and "to convict" instructions show that the charging period for all three counts of second degree

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[13] RCW 9A.44.079 (A person is guilty of rape of a child in the third degree when, among other things, the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old . . . .).

[14] State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996).

[15] State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).

[16] RCW 9A.44.076; but cf. RCW 9A.44.079 (A person is guilty of rape of a child in the third degree when, among other things, the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old . . . .).

rape of a child was February 6, 2006, to February 5, 2007. Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a jury to conclude that S.V. was 13 years old at the time of these crimes.

Lopez-Mendoza next claims that he was prejudiced by Detective Jones's use of police reports and other case documents to refresh his memory while testifying. But the record shows that the prosecutor followed the proper foundational requirements under ER 612 and related case law before Detective Jones used the documents to refresh his memory.[17] The record does not support Lopez-Mendoza's assertion that the defense did not have a copy of the documents.[18] There is no evidence in this record to support the claim that Lopez-Mendoza was prejudiced by the detective's use of reports to refresh his memory while testifying.

Lopez-Mendoza argues that Detective Jones's use of the phrase "sexual assault" was an improper conclusion with no foundation and that the trial court erred in failing to give a curative instruction. To the extent Lopez-Mendoza is arguing that the statement constituted improper opinion testimony, we disagree. The general rule is that no witness may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference.[19] Here, the State asked

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[17] See Karl B. Tegland, Courtroom Handbook on Washington Evidence, 336-37 (2008-09).

[18] Report of Proceedings (January 7, 2008) at 58-59 (defense cross-examines Detective Jones about specific information in police report).

[19] State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Detective Jones, "[W]hat sorts of abuse was [R.V.] describing?"[20] The detective responded, "She described sexual assault."[21] This statement did not express Detective Jones's opinion as to Lopez-Mendoza's guilt. No curative instruction was necessary.

Finally, Lopez-Mendoza claims that he was prejudiced by the State's use of a digital photograph of S.V. during its closing argument. He alleges that the photograph used during closing argument was not the same one earlier submitted into evidence. Though reference to the record and citation to legal authorities is not required under RAP 10.10, we will not consider the argument if it does not inform us of the nature and occurrence of the alleged errors.[22] Lopez-Mendoza has not met this burden. The record is insufficient for us to review these alleged errors. Moreover, Lopez-Mendoza fails to show how the alleged errors prejudiced his trial.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

[20] Report of Proceedings (January 7, 2008) at 36.

[21] Id.

[22] RAP 10.10(c).

Edlington, J. Ajid, J.